BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RALPH BAKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 258,433
LEGACY TRANSPORT, LLC	)	
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the January 3, 2003 Award of Administrative Law Judge Jon L. Frobish. Claimant was awarded a 68 percent permanent partial general disability after the Administrative Law Judge determined that claimant's contract for hire was finalized in Kansas, therefore granting the Kansas Division of Workers Compensation jurisdiction over this matter. Additionally, respondent was denied an offset under K.S.A. 1999 Supp. 44-501(h) for the Social Security retirement benefits claimant was receiving at the time of the injury. The Appeals Board (Board) heard oral argument on June 20, 2003. Stacy Parkinson was appointed for the purposes of this appeal as Board Member Pro Tem in place of Gary Peterson, who retired from the Board in March 2003.

APPEARANCES

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Garry W. Lassman of Pittsburg, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

(1) Does the Kansas Workers Compensation Act apply to this accident and, more particularly, was the contract for hire between claimant and respondent finalized while claimant was in Kansas or Oklahoma?

(2) Is respondent entitled to an offset for claimant's Social Security retirement benefits under K.S.A. 1999 Supp. 44-501(h).

(3) What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

Claimant suffered accidental injury on June 27, 2000, while working as a truck driver for respondent Legacy Transport, LLC (Legacy). The accident, which occurred in Urbana, Illinois, happened while claimant was unloading pallets. Claimant felt a pop and a sharp pain in his back with pain radiating down to his leg as he moved an empty pallet. Claimant was referred for medical treatment to Richard A. Gellender, D.O., on July 7, 2000.

Claimant first learned of a job opportunity when answering a newspaper want ad for a corporation identified as Forcum Truck Lines, Inc. (Forcum). Claimant read the ad in the Pittsburg Sun newspaper in Pittsburg, Kansas, where he lived. Claimant filled out an application and was ultimately hired in Oklahoma to drive for Mr. Forcum, the owner of both corporations. The specific ownership interest or corporate position of Mr. Forcum in both Forcum and Legacy is not explained. Linda Martinsen, the office manager for both corporations, merely describes Mr. Forcum as the "owner", without further elaboration.

Respondent contends that claimant's hire by Forcum and his later transfer to Legacy was merely a "formality", as both corporations are owned by the same person. However, evidence presented in the record indicates that Legacy and Forcum are separate corporations, created at different times. Claimant was driving for Forcum, which covered all 48 continental United States. Claimant expressed a desire to limit the distance that he traveled away from home. He was aware that Legacy's territory encompassed only 17 Mid-West states. After claimant expressed an interest to modify his route to drive for Legacy, he was contacted by Mr. Forcum. The contact occurred while claimant was in his kitchen in Pittsburg, Kansas. When he received the phone call from Mr. Forcum, claimant was offered the opportunity to transfer from Forcum to Legacy, which he accepted.

Claimant's testimony that he was standing in his kitchen in Pittsburg, Kansas, at the time of the conversation is uncontradicted.

When claimant began working for Legacy, he was already drawing Social Security retirement benefits. However, it is clear from the record that claimant did not terminate his employment, but simply began collecting the Social Security retirement benefits at age 62, when he became eligible. When claimant was injured, he was 64 years old and had been drawing Social Security retirement benefits for two years.

Claimant was examined and/or treated by several physicians. He was diagnosed with a herniated disc, for which surgery was recommended. Claimant elected not to undergo surgery, but did receive epidural steroid injections and extensive physical therapy. When released from treatment, he was given permanent restrictions against lifting weights greater than 20 pounds and was limited to occasional sitting, bending, squatting, kneeling, climbing, reaching, standing or twisting. Respondent was unable to accommodate those restrictions.

Claimant was awarded a 10 percent impairment to the body as a whole by Glenn M. Amundson, M.D., board certified in orthopedic surgery. This impairment was based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). Claimant was examined at his attorney's request by board certified orthopedic surgeon Edward J. Prostic, M.D., on February 22, 2002. Claimant was diagnosed with an aggravation of preexisting degenerative disc disease and assessed a 15 percent impairment to the body as a whole on a functional basis pursuant to the AMA *Guides* (4th ed.). Claimant was also restricted from lifting weights greater than 20 pounds and limited to occasional bending, squatting, kneeling, climbing, reaching, standing or twisting.

Both Dr. Amundson and Dr. Prostic were provided a task list prepared by vocational expert Karen Crist Terrill. In this list, there were fourteen non-duplicative tasks, of which Dr. Prostic found claimant could not perform five, and Dr. Amundson found claimant could not perform six. The Administrative Law Judge found claimant had lost the ability to perform five of the fourteen tasks, resulting in a 36 percent task loss.

After being released from respondent's employment, claimant attempted to obtain employment. Claimant testified to looking in a number of places, including auto retail businesses, lawn supply stores and Wal-Mart. He was restricted from many of these jobs because of the lifting involved. He also checked out electrical supply companies and industrial parks, and checked the newspaper every Sunday, making telephone contact with several of the employers listed there. He further checked with fast food establishments, Pittsburg State University and the local hospital, none of which could accommodate his lifting restrictions.

Respondent contends that a wage should be imputed to claimant because claimant's inability to find employment is not due to his injury, but because claimant suffered cancer in his throat and, as a result, must use a speaking aid in order to communicate. Claimant places the device against his throat in order to speak. However, it should be noted that claimant's cancer occurred in 1986, and he drove a truck for respondent for several years with this limitation.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1] With regard to whether the Workers Compensation Act applies to this claim, the Board finds that the contract of employment between claimant and respondent was finalized when claimant uttered his acceptance from his kitchen in Pittsburg, Kansas.

A principle of contract law is that a contract is "made" when and where the last act necessary for its formation is done.[2] When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance.[3] In this instance, the acceptance of the offer to transfer to Legacy was made by claimant while he stood in his kitchen in Pittsburg, Kansas. The provisions of the Workers Compensation Act in Kansas shall apply to injuries sustained outside the state where (1) the principal place of employment is within the state or (2) the contract of employment was made within the state, unless the contract specifies otherwise.[4] The Board, therefore, finds that the Kansas Workers Compensation Division does have jurisdiction over this matter, as the contract for hire was finalized upon claimant's utterance of the acceptance while in Pittsburg, Kansas.

With regard to the nature and extent of injury, the Board finds that the Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board finds that the Administrative Law Judge's determination that claimant has a 36 percent loss of tasks and a 100 percent loss of wages, thereby resulting in a 68 percent work disability, is appropriate and is affirmed by the Board.

Respondent's contention that claimant should be imputed a wage because of his voice impairment is not supported by Kansas law. Claimant's throat cancer occurred

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[1] *See* K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

[2] *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975).

[3] *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, 512 P.2d 438 (1973); *see also* Restatement (Second) of Contracts § 64, Comment c (1974).

[4] K.S.A. 44-506 (Furse 1993).

substantially before this accidental injury. In fact, claimant was hired by respondent approximately twelve years "after" his cancer and claimant was still capable of driving a truck for many years with his speaker box. The Board finds that respondent is not entitled to an imputation of a wage for this preexisting condition. Furthermore, the Board finds the post-injury job effort put forth by claimant was in good faith, thereby satisfying the good faith policies of *Copeland.*[5]

Respondent finally contends entitlement to an offset for the Social Security retirement benefits being received by claimant under K.S.A. 1999 Supp. 44-501(h). The Board finds that respondent's request should be denied. The Kansas Supreme Court, in *Dickens,*[6] discussed the issue of an entitlement to an offset under K.S.A. 1999 Supp. 44-501(h) when a claimant was receiving Social Security retirement benefits. The Supreme Court held "[t]here is no wage-loss duplication in the scenario of a worker injured after receiving social security benefits." While it is acknowledged that Dickens terminated his employment and then became reemployed after signing up for Social Security, the Board finds this factual distinction to have no significance. It is not whether claimant was a full-time or part-time employee, as was the case in *Dickens*, or whether claimant terminated his employment and then became reemployed after starting the Social Security retirement benefits. It is the timing of the start of the Social Security retirement benefits and whether they are being received at the time of the injury which dictates whether the offset will or will not apply. The Board finds, pursuant to *Dickens*, that respondent is not entitled to an offset under K.S.A. 1999 Supp. 44-501(h) for the Social Security retirement benefits being received by claimant.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated January 3, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

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[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

Dated this ____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Garry W. Lassman, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Director